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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

TIMOTHY JONES,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE THIRD SUPREME
JUDICIAL DISTRICT
OF
TEXAS

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30 pp

QUESTIONS PRESENTED

I.

Whether the Texas theft statute, on its face, is so vague and uncertain in its definitions of "effective consent" as to violate due process of law and be unconstitutional?

II.

Whether the Texas theft statute is so vague, uncertain and standardless in its definitions of "effective consent" as to leave the public uncertain as to the conduct it prohibits and likewise leaves judges and jurors free to arbitrarily decide, without any legally fixed standards, what is prohibited and what is not in each particular theft case?

III.

Whether the Texas theft statute is plain or unambiguious on its face as to its definition of "effective consent" but has been given an application by the Texas courts that violates due process of law?

IV.

Whether the Texas Courts, through an unforseen judicial construction of the Texas theft statute in its definitions of "effective consent" violated the due process requirement that persons be provided with fair warning of criminal conduct?

V.

Whether the Texas Courts, by virtue of making differing judgments regarding "effective consent" in ruling on theft convictions has violated due process of law by giving confusing and ambiguious warnings as to what amounts to criminal conduct?

VI.

Whether the conviction fo appellant was obtained in violation fo due process of law because of a fundamentally defective indictment failing to charge an essential element of the Texas theft statute, i.e., that the defendant acquired and exercised control over property without the "effective consent" of the owner?

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NO.

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OCTOBER TERM, 1984

TIMOTHY JONES
PETITIONER

VS.

THE STATE OF TEXAS
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE THIRD

SUPREME JUDICIAL DISTRICT

OF TEXAS

Timothy Jones, Petitioner, prays that a Writ of Certiorari issue to review the judgment from the Court of Appeals for the Third Supreme Judicial District of Texas entered in the above entitled case on 12th day of October, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is set forth in full in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Third Supreme Judicial District was entered on the 12th day of October, 1983. (See Appendix B). The jurisdiction of this court is involved under Title 28, United States Code, Section 2101(d), and U.S. Sup. Ct. Rule 20(1)(4).

Petition for rehearing of Timothy Jones' petition to the Texas Court of Criminal Appeals for its discretionary review of the Court of Appeals judgment of affirmance was denied on the 23rd day of May, 1984; with instructions to the Court of Appeals for the Third Supreme Judicial District of Texas not to issue its mandate until after the passage of fifteen days from the 23rd day of May, 1984; thus making its denial effective only after the passage of said fifteen days which ended on the 7th day of June, 1984; the date from

which the 60 days runs as provided in Sup. Ct. Rules, Rule 20(1)(4). (See Appendix F).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five, United States Constitution is set out in full as Appendix C; Amendment Six, United States Constitution is set out in full as Appendix D; Amendment Fourteen, Section 1, United States Constitution is set out in full as Appendix E.

RELEVANT STATUTES INVOLVED

28 U.S.C., Sec. 2106, set forth as Appendix I; Texas Theft Statute, V.T.C.A. 31.03(a)(b) and 31.01(4) set forth as Appendix G; Texas Theft Statute V.T.C.A. 107(9) set forth as Appendix H.

STATEMENT OF THE CASE

The Petitioner, Timothy Jones, was indicted by the Bell County, Texas, grand jury for felony theft over $200 and less than $10,000.00, in violation of V.T.C.A. Penal Code 31.03(a) and (b)(1). He was tried before a Bell County, Texas jury. The jury returned a verdict of guilty. The Petitioner, Jones, who was sentenced to two years imprisonment and to pay a fine of $5,000.00, appealed the judgment. The Court of Appeals for the Third Supreme Judicial District of Texas affirmed the judgment (a per curium opinion which was not published). (Appendix A). A petition for rehearing was timely filed and denied. A petition for discretionary review was timely filed with the Court of Criminal Appeals of Texas. The petition was denied on the 21st day of March, 1984. Petition for rehearing of the petition for discretionary review was timely filed and denied on the 23rd day of May, 1984, with instructions to the Court of Appeals for the Third Supreme Judicial District of Texas not to issue its mandate

until after the passage of fifteen days from the 23rd day of May, 1984; thus making its denial effective only after the passage of said fifteen days which ended on the 7th day of June, 1984.

Originally, the only ground of error presented to the Court of Appeals for the Third Supreme Judicial District of Texas, was the assertion that the indictment is fundamentally defective and is void because it failed to follow the essential wording of the statute in alleging that the property was taken without the "consent" of the owner, in lieu of alleging according to the dictates of the statute, that the property was taken without the "effective consent" of the owner. The subsidiary question fairly included therein was the constitutionality of the statutes' definitions of "effective consent". Such question of the statutes' constitutionality was not raised directly until the Texas Court of Criminal Appeals was considering Appellant's petition for its discretionary review of the Court of Appeals' judgment of affirmance. But said constitutional ques-

tion of due process of law was, nevertheless, before the Texas Appellate Court from the outset, even though the question was not named as a constitutional issue in the words of constitutionality and due process until the case reached the Texas Court of Criminal Appeals.

In Appellant's Motion for Rehearing of Order Refusing Appellants' Petition for Discretionary Review, Appellant stated in paragraphs IV - VIII, the following:

IV: This motion for rehearing reurges movant's Petition for Discretionary Review and argues that a statute, like an indictment, should place the citizen and/or an accused on clear and precise notice that is neither deceptive or ambiguous in the nature of what acts it seeks to proscribe as criminal.

V: Such notice must be equally clear to defense counsel.

VI: Such notice must be equally clear to a jury deliberating on the guilt or innocence of an accused. It should not allow one or more or all of the jurors to run rampant in their imaginations and speculations of what is meant by consent.

VII: To do so flies in the face and makes a fallacy, perhaps even a folly, of due process of law, a fair and impartial trial and renders the legislation of the people and the people themselves wandering together in a quagmire of perplexity and pessimism as to the future of our system of justice and the liberty of our land.

VIII: Movant cites the appropriate due process clauses of the Constitutions of the United States and the State of Texas as well as the due process articles of the penal laws of the State of Texas.

STATEMENT OF THE REASONS FOR GRANTING THE WRIT

All Questions Presented, I - VIII, will be discussed together as they all evolve out of the Texas theft statute, V.T.C.A. Penal Code 31.03(a) and (b)(1), defining theft, and 31.01(4) defining "effective consent", which is a material phrase set forth and defined in said theft statute (Appendix G) as a necessary element of the offense of theft. The Court of Appeals opinion (Appendix A) states that consent includes effective consent. Whereas, "consent" is not defined under the theft statutes but is defined under the general definitions of the Penal Code as meaning "...assent in fact, whether express or apparent", see V.T.C.A. 107(9) (Appendix H). A look at the definition of effective consent shows four ways that consent can be given and not be effective consent. Thus these four ways fit the definition of consent as set forth in V.T.C.A. 107(9) above but nonetheless are not "effective consent" as required by the statute in order to preclude the commission of theft.

The following cases are cited for the propositions they espouse in support of Petitioner's position that would answer in the affirmative to each question presented, to wit:

(1) A statute, plain and unambiguous on its face, may be given an Application that violates due process of law.

United States vs. Spector, Cal. 1952, 72 S. Ct. 591, 343 U.S. 169,.96 L. Ed. 863, rehearing denied 72 S. Ct. 1040;

(2) The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Scarbeck v. U.S., 1962; 317 F 2d 546, certiorari denied 83 S. Ct. 1897, 374 U.S. 856, 10 L. Ed 2d 1077, rehearing denied 84 S. Ct. 35, 375 U. S. 874; 11 L. Ed 2d 105.

(3) An unconstitutionally vague statute can

not be saved by definition in the indictment "if on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it," for "it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

Lanzetta v. New Jersey, 306 U.S. 451, 456-458, 59 S. Ct. 618, 83 L. Ed. 888 (1939)

(4) Convictions obtained by virtue of unforseen judicial construction of criminal statutes violate the due process requirement that persons be provided with fair warning of criminalized conduct.

Dunn v. U. S., 442 U. S. 100, 112, 99 S. Ct. 2190, 2197, 60 L. Ed. 743 (1979).

(5) Penal statutes are to be strictly construed. Ambiguities concerning the ambit of criminal statutes should be resolved in favor of lenity.

Duke v. University of Texas at El Paso, CA. Tex. 1981, 663 F 2d 522, rehearing denied 669 F. 2d 733.

(6) "A law fails to meet requirements of due process clause not only if it is so vague as to conduct it prohibits," but also if it "leaves judges and jurors free to decide, without any legally fixed

standards, what is prohibited and what is not in each particular case."

Ricks v. U. S., 1968, 414 F. 2d 1097, 1101

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Bob Looney
Counsel of Record
Attorney for Petitioner

(APPENDICES FOLLOW)

APPENDIX A

OPINION OF COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, FILED OCTOBER 12, 1983

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 3-83-100-CR

TIMOTHY JONES,

APPELLANT

VS.

THE STATE OF TEXAS,

APPELLEE

FROM THE DISTRICT COURT OF BELL COUNTY,

27TH JUDICIAL DISTRICT; NO. 31,161

HONORABLE W. E. BACHUS, JR., JUDGE PRESIDING

PER CURIAM

This is an appeal from a judgment of conviction for theft over $200.00. Tex. Pen. Code Ann. § 31.03 (Supp. 1982). After a jury trial resulting in a verdict of guilty, the jury assessed punishment at

incerceration for two years and a $5,000.00 fine.

In his only ground of error, appellant contends that the indictment is fundamentally defective. The indictment alleges, in pertinent part, that appellant:

> unlawfully acquire(d) and exercise(d) control over property, to-wit: a 1980 Ford Courier pickup of the value of more than $200 and less than $10,000, from Paul C. Boyd, the owner, without the consent of Paul C. Boyd, and with the intent to deprive Paul C. Boyd of said property . . . .

Appellant contends that the indictment is fundamentally defective because it does not allege that he acted without the "effective" consent of the owner.

Words used in a statute to define an offense need not be strictly pursued in the indictment, and it is sufficient to use other words conveying the same meaning or which include the sense of the statutory words. Tex. Code Cr. P. Ann. art. 21.17 (1966). Without there first being consent, there can be no issue whether the consent was or was not effective. See Tex. Pen. Code Ann., §§ 1.07(9), (12), and 31.01(4) (1974). Thus, the allegation that appellant acted "without the consent of Paul C. Boyd" is sufficient

to allege he acted without Boyd's effective consent.

The judgment is affirmed.

(Before Chief Justice Phillips, Justices Smith and Gammage)

Affirmed

Filed: October 12, 1983

(Not Published)

APPENDIX B

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JUDGMENT RENDERED OCTOBER 12, 1983

3-83-100-CR--TIMOTHY JONES V. THE STATE OF TEXAS

APPEAL FROM 27TH DISTRICT COURT OF BELL COUNTY

Before Chief Justice Phillips, Justices Smith and Gammage

AFFIRMED -- Per Ciriam Opinion

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment: it is ORDERED, ADJUDGED and DECREED by the Court that the judgment be in all things affirmed; and it appearing that the appellant is indigent and unable to pay costs, that no adjudication as to

costs is made; and that this decision be certified below for observance.

APPENDIX C

AMENDMENT FIVE, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsary process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX E

AMENDMENT XIV, SECTION ONE, UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

COURT OF CRIMINAL APPEALS

OF TEXAS

NUMBER 1141-83

JONES, TIMOTHY

VS.

THE STATE OF TEXAS

3rd Court of Appeals
Number 03-83-100

ORDER

The Appellant's Petition for Discretionary Review in the above numbered and entitled cause is refused.

PER CURIAM

DELIVERED MARCH 21, 1984.

Motion for Rehearing denied on May 23, 1984.

Do not issue your mandate for fifteen (15) days from May 23, 1984.

APPENDIX G

The pertinent part of the theft statute, V.T.C.A. Sec. 31.03(a)(b) states:

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

The pertinent part of the theft statute V.T.C.A., Sec. 31.01(4) states:

(4) "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if:

(A) induced by deception or coercion;

(B) given by a person the actor knows is not legally authorized to act for the owner.

(C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; or

(D) given solely to detect the commission of an offense.

APPENDIX H

The pertinent part of the theft statute, V.T.C.A. Sec. 107(9) states:

"Consent" means assent in fact, whether express or apparent.

APPENDIX I

Title 28, United States Code Section 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings be had as may be just under the circumstances.